

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.W., Appellant**

**and**

**U.S. POSTAL SERVICE, WEDGWOOD  
STATION, Seattle, WA, Employer**

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**Docket No. 11-1130  
Issued: November 23, 2011**

*Appearances:*

*John Eiler Goodwin, Esq., for the appellant*

*Office of Solicitor, for the Director*

Oral argument October 19, 2011

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 4, 2011 appellant, through her attorney, filed a timely appeal from the March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's compensation benefits effective July 29, 2010.

On appeal, appellant, through counsel, contends that the medical opinion of the impartial medical examiner is deficient in that it is equivocal, unsupported by adequate rationale and internally inconsistent. Counsel further contended that the claims examiner failed to discuss all of the medical evidence of record in its notice of proposed termination and termination decision.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before this Board. The facts as set forth in the Board's prior decision are hereby incorporated into this decision.<sup>2</sup> The relevant facts are set forth below.

On May 31, 2005 appellant, then a 46-year-old letter carrier, sustained injury to her right leg after carrying heavy weight over uneven terrain on wet ground for extended hours. By letter dated July 20, 2005, her claim was accepted for right tibialis tendinitis. Appellant's claim was also accepted for contracture of right tendon, right ankle sprain/strain and joint derangement of the right ankle and foot. By letter dated May 3, 2006, OWCP authorized surgery for right fusion of foot bones, right revision of calf tendon and right incision of heel bone. On May 16, 2006 appellant underwent a gastrocnemius resection of the right leg and navicular cuneiform arthodesis of the right foot. OWCP terminated appellant's wage-loss and medical benefits effective February 21, 2008. In a decision dated November 25, 2008, the Board reversed OWCP's decision finding that the termination was improper as there remained an unresolved conflict between appellant's treating physiatrist, Dr. Jeffrey C. Christensen, and Dr. R. David Bauer, the Board-certified orthopedic surgeon who conducted the second opinion. The Board found that the impartial medical report by Dr. Paul Williams, a Board-certified orthopedic surgeon, was insufficient to terminate benefits as his opinion was speculative and indicated that appellant had remaining residuals from her authorized surgery.<sup>3</sup>

Upon return of the case record, OWCP listed in a February 8, 2010 statement of accepted facts (SOAF), that the physical duties of appellant's job included lifting and caring for up to 20 pounds, standing 5 hours a day and simple grasping 8 hours a day. The SOAF also noted that appellant could lift/carry up to 70 pounds, kneel 15 minutes per day, climb ½ hour per day, pull/push ½ hour per day, reach above the shoulders ½ hour per day, drive a motor vehicle 1 hour per day, sit 2 hours per day, bend/stoop 3 hours per day, twist 4 hours per day and walk 5 hours per day.

On May 19, 2010 OWCP referred appellant to Dr. John Burns, a Board-certified orthopedic surgeon, for a new impartial medical examination. In a June 3, 2010 report, Dr. Burns listed appellant's diagnoses as bilateral *pes planovalgus* with generalized ligamentous laxity and status post arthrodosis of the navicular first cuneiform and navicular second cuneiform joint on the right foot. Although he noted that surgical intervention was not warranted, he stated that any need for surgery would be the result of the natural progression of *pes planovalgus* and not the employment injury. Dr. Burns opined that he saw nothing that would prevent appellant from performing her date-of-injury job as a letter carrier. On an attached work capacity evaluation, he advised that appellant should avoid climbing.

On June 24, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss compensation. By decision dated July 29, 2010, it terminated appellant's compensation effective that date.

Appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on November 22, 2010, appellant's attorney contended that, although Dr. Burns

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<sup>2</sup> Docket No. 08-1138 (issued November 25, 2008).

<sup>3</sup> *Id.*

indicated that he could find nothing that would prevent appellant from performing her date-of-injury job as a letter carrier, the statement of accepted facts indicated that appellant must climb one-half hour per day and that Dr. Burns indicated that appellant should avoid climbing. Appellant's counsel contended that this was an internal contradiction and reduced the value of Dr. Burn's report. Appellant also testified with regard to her job duties and indicated that she had to climb for more than 45 minutes a day.

By decision dated March 15, 2011, OWCP's hearing representative affirmed the July 29, 2010 termination of benefits.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>4</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>6</sup> Where the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>7</sup>

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.<sup>8</sup> However, when the impartial medical specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.<sup>9</sup>

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<sup>4</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

<sup>7</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>8</sup> *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Raymon K. Ferrin, Jr.*, 39 ECAB 736 (1988); *R.G.*, Docket No. 11-79 (issued September 9, 2011).

<sup>9</sup> *Nancy Keenan*, 56 ECAB 687 (2005); *Talmadge Miller*, 47 ECAB 673 (1996).

### **ANALYSIS**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits. A conflict in medical opinion arose between appellant's treating physician, Dr. Christensen, and the second opinion physician, Dr. Bauer. OWCP properly referred appellant to Dr. Burns for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). The issue to be resolved was whether appellant could return to work without restrictions. Dr. Burns noted that there was nothing that would prevent appellant from performing her date-of-injury job as a letter carrier; however, in the work capacity evaluation, he advised that appellant should avoid climbing. The SOAF clearly indicated that appellant's job required her to climb for one-half hour a day and appellant testified that she had to climb for a longer period of time. Dr. Burns stated that appellant could return to work without restrictions but also indicated that she should avoid climbing. The report of Dr. Burns is internally inconsistent. Because Dr. Burns' report was not wholly responsive to the question asked, OWCP did not meet its burden of proof to terminate benefits in this case.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective July 29, 2010.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 15, 2011 is reversed.

Issued: November 23, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board